SESSION 1947-48

SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS

ON

HUMAN RIGHTS

AND

FUNDAMENTAL FREEDOMS

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 10

THURSDAY, JUNE 17, 1948

WITNESS:

Mr. F. P. Varcoe, Deputy Minister, Department of Justice, Ottawa

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1948

MINUTES OF PROCEEDINGS

THURSDAY, June 17, 1948.

The Special Joint Committee on Human Rights and Fundamental Freedoms met as 4.00 o'clock p.m. The Joint Chairmen, Right Honourable J. L. Ilsley and Honourable L. M. Gouin were present. Mr. Ilsley presided.

Also present:

The Senate: Honourable Senators Crerar, Horner, Roebuck, Turgeon, Wilson.

The House of Commons: Messrs. Beaudoin, Croll, Diefenbaker, Fulton, Hansell, Robinson (*Simcoe East*), Smith (*York North*), Stuart (*Charlotte*), Whitman.

In attendance: Mr. F. P. Varcoe, Deputy Minister, and Mr. D. H. W. Henry, Counsel, Department of Justice, Ottawa.

The following, moved by Mr. Diefenbaker, was filed as a notice of motion to be taken up when the question of recommendations in the final report is considered by the Committee:

> That the Minister of Justice be requested forthwith to refer to the Supreme Court of Canada for determination by that Court of:
>
> (*a*) The question as to the power and jurisdiction of the Parliament of Canada to enact a Bill of Rights respecting the fundamental freedoms of religion, speech (including radio), press and assembly as well as the constitutional and traditional safeguards of the individual.
>
> (*b*) The question of the extent to which such fundamental freedoms or constitutional safe-guards are within the legislative competence of the Provinces.

Mr. Varcoe was called. He made a statement in relation to the effect of the enactment of a Bill of Rights as (*a*) a federal statute; (*b*) as a constitutional amendment; and, in particular, to its effect on existing and prospective provincial and dominion legislation, the common law, the sovereignty of Parliament, and the prerogative of the Crown, and was questioned.

The witness retired.

A submission, "The Case for a Canadian Bill of Rights", from the representative, Congregations of Jehovah's witnesses, was filed by the Chairman and copies distributed to all members.

The Committee adjourned at 6.05 o'clock p.m. to meet again Monday, 21st June, at 4.00 o'clock, p.m.

J. G. DUBROY,
Clerk of the Committee.

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MINUTES OF EVIDENCE

HOUSE OF COMMONS,
June 17, 1948.

The Special Joint Committee on Human Rights and Fundamental Freedoms met this day at 4.00 p.m. Right Hon. Mr. J. L. Ilsley (Joint Chairman) presided.

The CHAIRMAN: Gentlemen, the committee will come to order. It was agreed at the last meeting that at this meeting the Deputy Minister of Justice would give his views as to some of the implications of the bill of rights suggested by the committee for a bill of rights which was read to this committee at a recent session.

Mr. DIEFENBAKER: Mr. Chairman, before Mr. Varcoe gives his evidence would you allow me to say a word or so in view of your statement the other day? I was unable to be present and you indicated your views by the questions which you asked. I do not want to get into a controversy, holding rather divergent views to yours. You asked a simple question as to whether or not the parliament of Canada had the power to pass any bill of rights whereby constitutional freedoms of Canadians would be protected, and I realize that there is a great division of opinion on that subject and that Mr. Varcoe will give us his opinion today.

The CHAIRMAN: Not on that point.

Mr. DIEFENBAKER: Not on that point?

The CHAIRMAN: No.

Mr. DIEFENBAKER: Possibly I may continue with what I have to say. Amongst those who have divergent views there are those who hold that the parliament of Canada cannot pass laws to preserve constitutional freedoms of Canadians because of the fact that in most cases, with the exception of the criminal law, the matters fall within the legislative competence of the provinces. Well, that is a legal answer, but my answer to that would be that if that be true then the freedoms that accompany Canadian citizenship become in fact provincial variables; we would find ourselves in this country with nine kinds of Canadians whose freedom in each individual case would depend on the home address of each Canadian.

The CHAIRMAN: Mr. Diefenbaker, will you permit me to say a word on the question of order? The steering committee, before the last meeting of the committee, considered the order in which these matters were to be taken up, and it was agreed, and we found that the committee as a whole adopted the steering committee's report in this regard, that the question of the enacting of a bill of rights by means of a federal statute would be considered first; and secondly, we would consider the question of enacting a bill of rights by means of a constitutional amendment. Now, we discussed the question to some extent of enacting a bill of rights by means of a federal statute; we took no action on that; we left that for consideration when the recommendations of the committee were being formulated; and I announced my own conclusion that I came to, that I did not think that favourable consideration should be given to an attempt to enact a bill of rights by means of a federal statute.

We got then to the next stage where we would consider the alternative method, which is the one favoured by all except one of the bodies which have made recommendations to this committee, and that is by means of a constitutional amendment. Now, to be strictly in order, what you are saying now should come when we consider the recommendations. There will be plenty of opportunity to do that then.

Mr. DIEFENBAKER: Possibly, Mr. Chairman, you would permit me to proceed a little further, because what I have in mind is this, that because of that dispute or difference of opinion I am suggesting a motion moved by myself and seconded by Mr. Fulton:

> That the Minister of Justice be requested forthwith to refer to the Supreme Court of Canada for determination by that court of:
>
> (*a*) the question as to the power and jurisdiction of the parliament of Canada to enact a bill of rights respecting the fundamental freedoms of religion, speech (including radio), press and assembly as well as constitutional and traditional safeguards of the individual;
>
> (*b*) the question of the extent to which such fundamental freedoms or constitutional safeguards are within the legislative competence of the provinces.

I pass that to you, sir, as one comes back to the point we always arrive at, a stalemate, no matter what discussion we may have, and each would have his own opinion depending on the consideration he has given the subject; each endeavouring to be as honest with himself and with the committee in his interpretation of what the law is. And it is because of that that at this time I make this motion, so that between now and the next session we in parliament will know the degree to which there was a division of jurisdiction in the matter of fundamental freedoms as between the dominion and the provinces to the end that any enactment made by parliament will in fact be an enactment within the legislative competence of parliament and to which the answer cannot be given that by this enactment the rights under the British North America Act that have been allocated to the provinces have in any way been infringed upon or entrenched upon.

The CHAIRMAN: Now, on the question of order. Is the meaning of this resolution that this committee request the Minister of Justice to do this?

Mr. DIEFENBAKER: Yes.

The CHAIRMAN: Is not that beyond the terms of reference of the committee?

Mr. FULTON: The minister has raised a point of order to which I would like to reply. The terms of reference of the committee as discussed at the first meeting of the steering committee and reported in the proceedings of No. 2 had to do with the question of "what is the legal and constitutional situation in Canada with respect to such rights";

> (*c*) and what steps, if any, it would be desirable to take or to recommend for the purpose of preserving in Canada respect for the observance of human rights and fundamental freedoms.

And it is that phase of our reference which the committee is considering at this point.

The CHAIRMAN: Right.

Mr. FULTON: I think you will agree that the motion of Mr. Diefenbaker and myself would be within the limits of the terms of reference, and what my friend is doing is giving notice, as it were, that there are some of the committee

who feel that when we are considering our recommendation this is the form that recommendation should take.

The CHAIRMAN: That is perfectly in order. This is a matter to be considered when the recommendations to the parliament which appointed us are being considered. It is quite open to any member of the committee to make an argument for a recommendation to this effect—a recommendation.

Mr. FULTON: To the minister?

The CHAIRMAN: To those who appointed us—a recommendation of the committee to those who appointed us. The clause in the order of reference, "that the committee shall have power to recommend" means to recommend in their report.

Mr. FULTON: Yes.

The CHAIRMAN: To those who appointed them.

Mr. BEAUDOIN: Therefore, this matter will stand until we come—

The CHAIRMAN: —to the recommendations. Let us take it as a notice that Mr. Diefenbaker and Mr. Fulton will wish to place that in the report, recommending a reference to the Supreme Court of Canada. That is the meaning of that, is it not?

Mr. DIEFENBAKER: Mr. Chairman, if I do not happen to be here when the committee meets to make its recommendations, I wish you would submit that motion at that time on my behalf.

The CHAIRMAN: All right.

Hon. Mr. ROEBUCK: In that case may I ask this question: would it not be necessary to have a draft bill submitted to a court? If you are going to get a decision from a court an academic proposition such as is included in this resolution would hardly be answered by a court, because there is nothing that is sufficiently definite for a court to rule on.

The CHAIRMAN: That is the position I would take when we come to discuss the recommendation. It would be open to anybody to take some specific or some concrete provisions and say, "Refer those to the Supreme Court of Canada."

Mr. DIEFENBAKER: That is a matter of draftsmanship.

The CHAIRMAN: Mr. Varcoe produced at the last meeting a tentative sort of federal statute which, as he said, might be the kind of statute that would be considered. It would be open to anybody to say, "Why do you not refer that to the Supreme Court of Canada?"

Mr. DIEFENBAKER: That is exactly the point. The question of the draftsmanship of what is being submitted is a difficult question and it will require a great deal of consideration by the draftsmen of the Department of Justice to the end that the Supreme Court of Canada would be in the position to properly interpret the nature and scope of the bill of rights on which they are asked to determine the matter of jurisdiction as between the dominion and the provinces; and the general submission is what I now place before you.

The CHAIRMAN: Perhaps I should not be too hasty in prejudging these things, but I have been so impressed with the vagueness of everything and the drift of everything in this committee that I, perhaps, went beyond what I should have the other day; and I am quite prepared to go beyond it again today. I am going to say that unless I develop a different opinion between now and when we make the recommendation I will be opposed to the idea of dealing with this by means of a federal statute. That is what I tried to say the other day and that is by way of notice what my attitude will be when we prepare the recommendation.

Mr. DIEFENBAKER: In view of that statement would you be opposed to a constitutional amendment?

The CHAIRMAN: That is what we considering this afternoon.

Hon. Mr. ROEBUCK: Would the type of statute not make a difference? If we had a statute that was within the jurisdiction of the dominion parliament the objections that you raise would not apply.

The CHAIRMAN: Oh, yes, I do not put it entirely on that. I tried to put it the other day, perhaps not by giving my reasons completely, that inevitably we got into a debatable land productive of great conflict. That was my point the other day; and when we have practically nobody who has made submissions asking for a federal statute at all—the submissions are in favour of a constitutional amendment—and when it is remembered that a federal statute does not effect any complete guarantees because it may be repealed at the next session or at another session of the same parliament, let alone future parliaments—when it is remembered that to the extent it is valid it binds the provinces and does not bind the dominion—those are very powerful reasons in my mind against dealing with the matter by that method.

But as I say, this is all a matter for discussion when we come to make our recommendations; but for the sake of getting somewhere and getting some definiteness I am willing to be fairly outspoken on a matter of a federal statute. Those are the views I am going to put forward when we consider the recommendations. My mind is open on the question of a constitutional amendment which does effect a constitutional guarantee, because there can be no doubt about the constitutionality of that once it is passed.

Mr. FULTON: Yes, but, Mr. Chairman, is not there some doubt as to the actual dividing line between a federal statute and a constitutional amendment? A constitutional amendment requires action on the part of the federal parliament, and you are immediately going to have raised the same question: is it competent for parliament to take that action whether you pass a federal statute or whether you ask the House of Commons to pass a resolution for an address to the Imperial parliament to amend the constitution? You are going to have the same point raised: is the statute or resolution within the competence of the federal parliament?

The CHAIRMAN: No resolution asking for a constitutional amendment can possibly be beyond the competence of the federal parliament. The question of the propriety of attempting to pass a resolution is a very serious one, and if we follow precedents of the past we will have to consult with all the provinces before we attempt to introduce any such resolution. But there is no question of the validity of such a resolution—the constitutionality.

Mr. FULTON: We can pass any resolution we wish, but would not that be imposing upon the Imperial parliament the burden of saying whether this is a question that can be the subject of action by the federal parliament? In other words, to make them make the decision which we have avoided making.

The CHAIRMAN: I think the Imperial parliament has always complied with resolutions from the parliament of Canada, and I think governments of Canada have, therefore, been extremely careful and should be extremely careful to consult the provinces before they attempt to put the Imperial parliament in that position.

Mr. FULTON: My only point is: do you not really have to settle the same issue in each case, whether it is proper for the federal parliament to legislate by statute or act by way of resolution on this question? Could you not settle that question first, whether it is proper for the federal government to act, no matter what manifestation its action takes—statute or resolution?

The CHAIRMAN: That is not the preliminary question; the preliminary question is whether it would be desirable to have such constitutional amendment even if everybody agreed to it.

Hon. Mr. ROEBUCK: Have we not frequently asked for an amendment to the constitution which would infringe the rights of the provinces? Take, for instance, the Unemployment Insurance Act.

The CHAIRMAN: Right.

Hon. Mr. ROEBUCK: We amended the constitution in order to give the dominion parliament power to pass that statute, the difficulty being that it was within the competence of the provinces.

The CHAIRMAN: We got the consent of all the provinces before we did it.

Hon. Mr. ROEBUCK: We did not have to. We could have gone ahead with a resolution of both houses and asked the Imperial parliament. We asked the consent of the provinces as a matter of diplomacy.

Mr. DIEFENBAKER: I am quite interested in that statement of the minister and also the statement of the former Attorney General of Ontario. I want to be clear. Did the minister say that regardless of whether or not a constitutional amendment would infringe upon the jurisdiction of the provinces, that there was nothing either in practice or otherwise requiring the federal parliament to consult the provinces before passing such an amendment?

The CHAIRMAN: There is nothing in the law.

Mr. DIEFENBAKER: No, I understand; but is there nothing in practice?

The CHAIRMAN: Oh, practice?

Mr. DIEFENBAKER: Practice, having the effect or result of law.

The CHAIRMAN: I do not know whether it has the result of law or not, but I know that any government would be crazy to propose that parliament pass a joint resolution amending the constitution in such a way as to invade the rights of the provinces without getting the consent of the provinces. The question of law is not so important; it is just that nobody would think of doing anything else unless they wanted to disrupt the country.

Hon. Mr. GOUIN: Perhaps one could say that in decency the province should be consulted if we wish to adopt such an important change.

Mr. DIEFENBAKER: I am not one who takes the other view, because when the address came up to provide for redistribution, to change the basis of redistribution, I was one of those who suggested that the provinces should be consulted, but that was not the view of the then Minister of Justice. He practically took the view as the present Minister of Justice, even going as far as to say that language rights could be done away with by an address to parliament without consultation with the provinces—a view that I took strong objection to—and I see the Minister of Justice today has the same view as far as the power that denies the propriety of such a thing is concerned.

The CHAIRMAN: Yes, but the reason that the provinces were not consulted in the case of redistribution was undoubtedly that it lay within the constitutional power of the Dominion of Canada; no provinces were being deprived of any right granted to them by the British North America Act. It was a matter wholly within the jurisdiction of the dominion; it is a very different thing.

Mr. FULTON: There were two views on that.

The CHAIRMAN: I do not think there were two views.

Mr. DIEFENBAKER: Yes.

Mr. FULTON: Oh, yes.

Mr. BEAUDOIN: May I add this, that with reference to language rights the answer of the then Minister of Justice to Mr. Smith of Calgary West was that the power is there but the propriety is absent.

Mr. DIEFENBAKER: Yes, legally; the power is there; the propriety is absent.

The CHAIRMAN: I propose that we proceed to examine the Deputy Minister of Justice as to the implications of the insertion of the clauses in the British North America Act. They are found on page 18 of the submission of the committee for a bill of rights.

Mr. F. P. Varcoe, Deputy Minister of Justice, called:

The CHAIRMAN: Have you any views on this, Mr. Varcoe?

The WITNESS: I have made what has been a rather superficial examination of this proposed clause to be inserted in the B.N.A. Act. Much of the language, a great deal of the language that we find there is taken from the bill of rights in the United States constitution, and when we consider that they are still disputing, after one hundred and fifty years, as to the meaning of some of it, any expression of opinion that I may give must be regarded as fairly superficial.

There are one or two general remarks I should like to make before examining specific questions and specific provisions. The first of these is that a bill of rights is a definition of freedom *pro tanto,* that is it converts what is essentially a political concept into one which is essentially legal. The courts interpreting the definition exercise, therefore, a legislative power and so take the place of the legislature. I should think that that is a matter that a committee or any person advocating a change in our system would want to take account of before adopting such a measure.

Mr. FULTON: I wonder if the deputy minister would permit an interruption? Would you expand on what you mean when you state that the courts interpreting such a definition exercise legislative power?

The WITNESS: Let me give you an example of what I mean. Paragraph (*c*) in this draft refers to unreasonable interference with privacy. This provision comes into operation only when some statute, say of a province, has been enacted which is challenged.

Now, what is unreasonable interference is a matter of opinion; the court which passes upon that statute holding it valid or invalid, as the case may be, is exercising a quasi legislative power.

Mr. DIEFENBAKER: The interpretation is on the basis of conditions prevalent at that particular time.

The WITNESS: Not necessarily; it depends upon the view the particular judge has as to what is unreasonable.

Mr. FULTON: Is not that the same function they exercise in interpreting a statute?

The WITNESS: That is true, but it imports into the constitution an additional element of uncertainty.

In this same connection I should like to venture this remark, that I believe from an examination of the cases in the United States over a period of a great many years that when you have set out a definition of freedom the psychological tendency of persons operating under that statute is to say: "Now, this is as far as we can go, but let us go all that way." An intolerant group, for example, proposes a certain legislative measure, and when that is objected to on the ground that it is intolerant the answer made by them is—and I am sure it has been in the United States time and time again—"well, let us test it in the courts";

and the result is that you transfer what one authority called "the struggle for freedom" from the political arena to the judicial arena with some consequences that are not good.

Another point I wish to make here is that this imports a degree of uncertainty into our affairs.

Dealing now more particularly with the proposed section 148, you will note that it is only the legislatures that are restrained; there is nothing here that restrains the individual or the government. There would be nothing, for example, to prevent the Crown exercising whatever prerogative powers it may have. There is nothing in 148 to prevent the Crown from exercising prerogative powers that are not today very much used. The prerogative would remain in effect and you might expect a somewhat reactionary tendency to follow.

Mr. DIEFENBAKER: For instance, what is that prerogative power?

The WITNESS: For example, in time of war there are great prerogative powers exercisable by the Crown. Likely members of the committee may remember that in the first great war the Crown in Great Britain undertook, for example, to take property without payment of compensation under the prerogative powers, and that was upheld by the courts for a time. Finally the House of Lords held the prerogative power had been displaced by a certain statute. That was in the De Keyser's Royal Hotel case. I suggest that if you restrict the legislature without restricting the sovereign under our constitution certain powers would remain which if exercised would indicate a reactionary tendency.

Mr. DIEFENBAKER: Is it a prerogative right in time of emergency and danger for the Crown to suspend ordinary freedoms?

Hon. Mr. ROEBUCK: Habeas corpus.

Mr. DIEFENBAKER: Habeas corpus and the like.

The WITNESS: The point is that throughout our time these things have been done under statutes.

Mr. DIEFENBAKER: Yes, I appreciate that, but I am asking whether that is one of the prerogative rights.

The WITNESS: Yes, I should think so.

Mr. FULTON: Would you care to give a few of the prerogative rights which it is well established that the Crown has at the present time in Canada? My impression was that the actual prerogative rights of the Crown were largely gone.

The WITNESS: They are only in the sense that they have been displaced by statute; and remember this, that when you pass this amendment, statutes which do interfere with the liberty of the subject would have to be treated as being abrogated by the constitutional amendments and your prerogative would probably be back in full force.

Mr. FULTON: If you added to the first part of proposed section 148 the general words, "or the Governor General in Council to make regulations"—so as to limit the power to legislate by Order-in-Council?

The WITNESS: There is no doubt it could be rectified to take that into account.

Mr. DIEFENBAKER: As a matter of fact, Mr. Varcoe, in that connection is not there a provision in the bill of rights in the United States that the maintenance of these civil freedoms is subject to abrogation in time of danger or in war?

The WITNESS: No. There are two quite separate provisions. There is the bill of rights, and then there is the specific provision that congress may carry

on war, and that has been interpreted as meaning that in the case of clear and present danger the executive may override the bill of rights.

Mr. DIEFENBAKER: A provision like that in a constitutional amendment in our country would preserve the prerogatives of the Crown to wage war and act accordingly, would it not?

The WITNESS: Something of that kind might have to be considered.

The CHAIRMAN: What it would do would make it possible for parliament to pass such measures as the War Measures Act and under that Act effect arbitrary arrests and detentions.

Mr. DIEFENBAKER: That is right. In time of war and emergency, the matter of national defence in war has always had about it the privilege of parliament to infringe upon the rights of the individual as against the state. That is the basis of McKechnie's article on the subject. I think it is chapter 2 in connection with the Magna Carta that sets that out in some detail.

The CHAIRMAN: Without any bill of rights parliament can do whatever is necessary to legislate, but when you have a bill of rights apparently in the United States it was necessary to put in something precisely preserving rights.

Mr. DIEFENBAKER: Yes, as I say, there was an express provision.

The WITNESS: In answer to Mr. Fulton's question, I find I have here a list of a few of the prerogative powers exercisable in time of war: to order a blockade; place an embargo on shipping; to enter private lands; to erect fortifications; to require personal service of subjects if there is imminent danger; to prohibit exports; to imprison alien enemies and prisoners of war, and there are many more.

Hon. Mr. GOUIN: In our own constitution, section 91(7), militia and military and naval services and defence: we think that would be sufficient even if we had the amendment.

The WITNESS: This amendment says, "notwithstanding anything in this Act," which would exclude the operation of section 91 or anything in section 91 which conflicted with it.

The CHAIRMAN: For a bill of rights to be any good it would have to be "notwithstanding anything in this Act." If you leave 91 in full force the bill of rights would not restrain you at all.

Hon. Mr. GOUIN: To make it quite clear it would seem to me that the powers of the Crown even in time of war would be curtailed.

The WITNESS: I would say that the powers of the legislature would certainly be curtailed—both the legislatures and parliament; but I was pointing out that this says nothing about the prerogative, and consequently it might be open to the Crown acting independently of parliament to do many things that would conflict with the proposed bill of rights.

Hon. Mr. GOUIN: It would diminish the powers of parliament.

The WITNESS: In some cases the powers of the Crown might be enlarged.

Hon. Mr. ROEBUCK: There can never be a clash between a statute and prerogative powers, can there? When the two are antagonistic in some way the statutory power overrides the prerogative power, and the prerogative power no longer exists.

The WITNESS: That is right. This statute says nothing about the prerogative.

Hon. Mr. ROEBUCK: True, but to the extent the prerogative power would be contrary or inconsistent with this bill it would affect the prerogative powers.

The WITNESS: What I am saying is that this bill as it stands would not touch the prerogative at all; it only purports to impose a restriction on parliament and legislatures and not on the Crown.

Hon. Mr. GOUIN: I follow you now.

The WITNESS: Now, coming down to the specific questions, and some of those were posed by the chairman at the last meeting more or less in the form I have them here. One of the questions was, would the law relating to libel, criminal and civil, remain in effect? I think that is about the way the question was put. In other words, would the restriction which reads, "abridging freedom of speech and expression, or of the press or other means of communication . . ." have the effect of preventing the respective legislatures from dealing with the law of libel, criminal and civil, or would this amendment abrogate the laws that now exist?

Now, I think that it could be said that these laws would not be abrogated and that the legislatures would continue to have certain legislative powers in respect of these matters; parliament in the case of criminal libel and the legislatures in the case of civil libel.

I say this because freedom of speech, of expression and of the press has always recognized as subject to the limitation that defamatory matter may not be communicated. That has been part of our law from the outset. And when we speak of freedom of the press and of speech we mean freedom within certain limits.

The CHAIRMAN: May I ask a question? Mr. Fulton had a suggestion that we amend the criminal law in such a way as to prohibit the distribution of what are known as crime comics. Suppose this section 148 were in the constitution and a law were passed prohibiting the distribution of crime comics, could any person prosecuted successfully plead the provision of the statute stating that the freedom of speech and expression and of the press and other means of communication had been abridged?

The WITNESS: I was coming to that in a moment. Perhaps I had better follow my own line of reasoning, because my answer to that question will be a little more intelligible when I have dealt with the first question.

I should like to say one thing more about this question of libel. The existing concepts of libel would, in my opinion, continue and the laws relating to them would remain valid. But I should think it is very doubtful if either parliament or a legislature could alter those laws substantially if this came into force. For example, suppose the provincial legislature proposed to make a substantial amendment in connection with civil libel on the subject of privilege; suppose they said that this privilege of the press on certain occasions will no longer exist; I should think it would be doubtful if the legislature would have power to do that because that would surely be an abridgment of the freedom of the press as we know it today.

Mr. FULTON: It surely would not be correct to say they could not legislate with respect to libel, because although they could not abridge freedom in that way by curtailing privilege they could always make new provisions with respect to what was to be libellous. It is not correct to say they could not legislate at all, is it?

The WITNESS: I am not at all sure they could redefine libel so as to restrict the publication by a newspaper, let us say, of something that is today well recognized as publishable. I doubt if they could do that, because otherwise if parliament or a legislature can by definition change the foundation of the thing by redefining libel, there is no sense in this restriction.

Mr. FULTON: My point is that they probably could not, say, create new offences of libel, but they could surely enact new statutes or change existing statutes as to the proof of libel. They could legislate with regard to libel, but would not create new libel.

The WITNESS: They could legislate about procedure and evidence and so on, but they could not, I should think, create any new offences.

Hon. Mr. ROEBUCK: They could not extend or restrict the provisions with regard to fair comment which is pled by a newspaper as justification.

The WITNESS: I mentioned privilege as an example of that.

Hon. Mr. ROEBUCK: Yes, privilege or fair comment, because that would restrict the liberty of the press which they formerly enjoyed.

The WITNESS: Yes.

Hon. Mr. GOUIN: Your question would be, does this abridge the freedom of the press?

The WITNESS: Yes. Now, I come to the chairman's question and I shall deal with the purely civil side. Mr. Ilsley's question was: what about crime comics? I thought about that for a while this morning and I came to this tentative conclusion, that they could be prohibited only if parliament thought they were obscene or blasphemous or in some way injurious to the public morals, and if a court having before it a particular case took the same view. In other words, that could not be prohibited merely on the ground that parliament thought they were undesirable. They would have to contain some such elements as are now regarded as criminal in connection with the publication of such material.

Mr. FULTON: In other words, you mean you could not create a fresh crime and make it punishable to publish something if, in the words of the new statute, the publication were "substantially or exclusively devoted to the portrayal of crime"?

The WITNESS: Yes. I was thinking of Lord Haldane's observation when he said that criminal meant by its very nature criminal. That was later overruled, and it was held that parliament had no such restriction on it. But I believe if you put this amendment in, then in the field of criminal libel you would have imposed upon parliament restrictions so as to prohibit parliament from preventing the publication of matter, or limiting it—unless it was by its very nature criminal.

Mr. FULTON: Could parliament resort to this: that the publication of books or magazines substantially or exclusively devoted to crime shall be deemed to be against public morals?

The WITNESS: I do not think that parliament could do that. That is just redefining the freedom or attempting to, and it seems to me that would be beyond the power of parliament. I feel it would. I have not thought that out to the end. Probably I have not made a satisfactory answer; but as the situation is today parliament could say that that type of publication is bad and we are going to make it criminal to publish it, even if a large proportion of the people thought it was bad; but if you put this in then parliament could only prohibit what is on its very face obscene or blasphemous or the like.

The CHAIRMAN: Could I ask one more question? Could parliament make a stricter definition of seditious libel if we had this provision in the constitution?

The WITNESS: I had not thought of that.

The CHAIRMAN: It is very important when you consider the freedom of the press, because by monkeying with that sedition section you can restrict the freedom of the press very effectively.

The WITNESS: Yes. The same difficulty will have to be considered. It may be that as sedition has a pretty wide connotation perhaps it would not be necessary to make any redefinition.

Mr. HANSELL: Do I understand, Mr. Varcoe, that in your opinion the dominion parliament has no right by way of statute to protect the public morals?

The WITNESS: At the present time?

Mr. HANSELL: Yes.

The WITNESS: Oh, no, on the contrary.

Mr. HANSELL: How could they protect the public morals without passing some law, some legislation? I do not quite get that.

The WITNESS: Perhaps I should go over that ground shortly again. At the present time parliament has unlimited powers to enact legislation to protect the public morals in the matter of the publication of periodicals. If this amendment to the constitution were enacted then the parliament of Canada would be prohibited from abridging the freedom of the press.

Mr. DIEFENBAKER: Is not that exactly the point? Provision is made for freedom of the press in the United States constitution, but the fact that there is such a provision has not prevented the passing of the type of legislation to which Mr. Hansell has made reference, has it?

The WITNESS: I made a search to see if in any of the forty-eight states they prohibited the publication of crime comics and I could not find that they have; and I reached the conclusion they considered they could not do it but I may be wrong about that.

Mr. FULTON: Must not we make a distinction between the absolute prohibitions of publication on the one hand, and making it a criminal offence to publish certain things and leaving it to the courts to determine whether the publication comes within the definition, on the other?

The WITNESS: That would render this thing nugatory. I do not think you could get around the plain words of this amendment by suggesting the making of it a criminal offence. That would be an abridgment of the freedom of the press.

Mr. FULTON: There would admittedly be a fine argument in court. One side would say that the press never was free to endanger public morals and therefore this is not an abridgment of freedom, and the other side would say that you are restricting our rights to publish whatever we choose, and therefore you are abridging our freedom. But why not permit such argument, and let the courts decide?

The WITNESS: I might admit, sir, that Canada could, under this, legislate to prohibit these comics if they, in the opinion of a court, unduly had the effect of endangering public morals; according to the standards we have at this time.

Mr. DIEFENBAKER: Has parliament got the power today to declare that this booklet I have before me, the submission of the committee for a bill of rights, is an offence against the criminal law, regardless of what it contains?

The WITNESS: If it appears that parliament was genuinely doing that, and not doing that to effect something else, parliament has unlimited powers to prohibit. I will give you an example. In the leading case of the Reciprocal Insurers vs. Parliament had enacted a statute which provided that any person who acted as an insurance agent without taking out a licence committed a criminal offence, and that was sought to be upheld as valid criminal law. The Privy Council refused on the ground that it was an indirect scheme to license insurance agents.

Hon. Mr. GOUIN: In other words, something to contravene the constitution. It was not really criminal under paragraph 27 of section 91.

The CHAIRMAN: In the combines investigation case—the Proprietary Articles Trade Association case—they held that the Combines Act is valid criminal legislation, although it was strongly argued that it was not; that it was an attempt to regulate the freedom of persons to contract with one another.

The WITNESS: Yes, that was one argument. There have been many cases. The prohibition of the operation of street cars on Sunday was upheld as being valid criminal law.

Now, the next question I have in my notes is: what are the consequences so far as dominion and provincial laws are concerned? That is to say, if this amendment were adopted, what effect would it have on existing dominion and provincial laws?

My answer, given with some hesitation in view of the section 150, is that dominion laws now in force or provincial laws now in force which conflict with this amendment would be abrogated by the enactment of this constitutional amendment. Any law now in force which is in conflict with it would be abrogated.

Hon. Mr. GOUIN: From the date of the coming into force of that Imperial Act.

The WITNESS: Yes. I think there is authority in the United States for this proposition under their constitution.

Mr. FULTON: You said a moment ago that you had some hesitation in giving that answer.

The WITNESS: Yes, because section 150 says that rights conferred shall not be deemed to abridge any right of any person. That will have to be taken into account.

Mr. FULTON: Yes, because this section appears not to be directed against the preservation of the right of an individual under any existing statute.

The WITNESS: It is not rights we are aiming at here, it is prohibitions. Suppose you had a provision in the Criminal Code relating to the publication of a newspaper; suppose we had such a provision which restricted the publication; now, that statute would not be saved by this because there is no existing right of any person there.

Mr. FULTON: Therefore, restrictive statutes in the province would be abrogated by this.

The WITNESS: Yes. Those which confer rights would not. But I should think that most of the statutes in question would be restrictive statutes.

The next question I have is: what are the consequences of the provision preserving the rights to be represented by counsel? I do not quite understand that because so far as I know the only right that a person has to be represented by counsel is in the case of litigated matters. For example, if a person applied for a licence to operate a hotel or a tavern I do not suppose anyone would say he had a right to be represented on that application by counsel, or in any of the other great number of occasions where persons appear and sometimes do bring counsel with them.

Hon. Mr. GOUIN: Sometimes there are special Acts. The old Quebec licence law provided that the parties could be heard themselves or by counsel when making application for a licence, but that is all gone now.

Mr. DIEFENBAKER: Depriving anybody of a fair trial or the right to be represented by counsel?

The WITNESS: Yes, that would have an interpretation placed on it. It is limited to a trial. I do not know whether that is important because I cannot conceive of a parliament or a legislature depriving a person who is taking part in a trial to be represented by counsel.

Hon. Mr. ROEBUCK: There is a bill before the Commons at the present time to deprive people of the right to have a lawyer appear as their counsel.

The WITNESS: Not at a trial.

Hon. Mr. ROEBUCK: It is pretty close to a trial.

The WITNESS: Not a litigated matter, anyway.

Hon. Mr. ROEBUCK: A conciliation board.

The WITNESS: Yes.

The CHAIRMAN: Were you starting to say something about witnesses?

The WITNESS: It may be that the draftsmen of this section have something in mind on the question of witnesses. Sometimes the question arises as to whether a witness can claim to have the advice of counsel, although he is not entitled to a representative by any means.

Mr. FULTON: Your view is that the words in this part of subsection (*e*) with regard to a fair trial confines it to matters being litigated before the courts; but to follow up Senator Roebuck's remark, would it be your view that in the case of a dispute before a labour relations board, that that would not be called a "trial" within the meaning of this section?

The WITNESS: That is correct; that is the interpretation I would be inclined to give.

Mr. FULTON: It must be at a trial?

The WITNESS: Yes.

Hon. Mr. GOUIN: Before a court; not before a board.

The WITNESS: If it were intended to extend that to the cases before labour relations boards this might have to be amended.

The CHAIRMAN: Would it give an injured workman the right to be represented by counsel before a workmen's compensation board?

The WITNESS: I do not know what the workmen's compensation statutes say upon the subject; I do not know whether they contain any provisions or not.

Hon. Mr. GOUIN: The practice in Quebec is that they are allowed to appear, but they have no right to obtain fees.

Mr. DIEFENBAKER: That is the same in Saskatchewan; but they have no inherent right to appear. That is the attitude they take in Saskatchewan with regard to the workmen's compensation board. I am not speaking about the board since the present government came in.

The CHAIRMAN: Do you take it that that subsection (*e*) merely preserves the right?

The WITNESS: I thought that was limited to litigated matters and would not extend to every kind of case, such as those mentioned.

The CHAIRMAN: Does it confer rights?

The WITNESS: I do not know whether there is such a thing as a right to be represented by counsel. The language is a little loose, I should say.

The CHAIRMAN: I may say that I took it that the section meant that a right was being conferred to be represented by counsel; not merely that existing rights were being preserved; that rights were being conferred.

Hon. Mr. GOUIN: Outside of any explicit statute, there is no possible doubt but that there is a custom to use counsel established for a criminal trial for instance. Nobody has ever questioned the right of the accused to have counsel; it is a fundamental right of democracy; and we have the same thing for civil proceedings in our code in our province. We provide for representation by counsel.

The WITNESS: Yes, in the Criminal Code there are provisions which indicate the accused may be represented by counsel.

Hon. Mr. GOUIN: The result of this provision is clear; it is considered as a fundamental right of a British subject that he be allowed to have the use of counsel, and a judge would never proceed against someone without having him appear.

The CHAIRMAN: We have all sorts of boards and inquiries. These boards and inquiries have semi judicial or quasi judicial duties to perform. Does this provision confer upon persons going before these boards a right to be represented by counsel?

Hon. Mr. ROEBUCK: Such as the spy inquiry. There was some objection taken to the exclusion of counsel on that occasion.

The WITNESS: Well, if you restrict this whole paragraph by means of the words "a fair trial" the answer is in the negative.

Hon. Mr. GOUIN: Technically it is not a trial.

Mr. FULTON: Would you add the words "or the right to be represented by counsel in any quasi judicial proceeding," to use the words suggested by the minister? Do you think that would make it sufficiently broad?

The WITNESS: Yes.

Mr. DIEFENBAKER: Some of these boards and some of these investigatory persons deny the accused the right of counsel. One is in the Excise Act, wherein an investigation may be made by a police officer or a member of the board of excise, and the individual summoned before the board is required to give evidence. He is denied the right of protection provided for by the Canada Evidence Act and he is also denied the right to have counsel. In one of those cases I happened to represent the accused—Rex vs. Hicks—it is a reported case—and the man who was summoned refused to give evidence unless he had counsel present and unless he was granted protection. He refused to give evidence and was prosecuted for his failure and ultimately it came before a judge of the Court of King's Bench who thought there were certain fundamental rights regardless of the statute which an individual enjoyed; but the Chief Justice of Nova Scotia, speaking for that court recently, refused to follow the Hicks case, indicating in his judgment that no person under the law as it now is has a right to be represented by counsel. In that case Judge Chisholm was dealing particularly with an excise case.

The CHAIRMAN: The point is that very often it is hard to draw a distinction between a person who is in real jeopardy and a person who is merely summoned to give evidence. A provision such as this, if it is conferring a right, must be examined carefully because perhaps everybody, witnesses and all, will be entitled to be represented by counsel.

Mr. DIEFENBAKER: There is a Court of Appeal case, Rex vs. Emele, a murder case, in the province of Saskatchewan. The Court of Appeal held in that case that the refusal on the part of the police to allow accused to have his counsel does not prevent the admission of any statement made by that accused before his counsel was finally retained. And the same point is raised that there is no fundamental right, as a matter of fact, that a person is entitled to counsel under common law. I say this subject to Mr. Varcoe's correction, but there is an exception in the case of a nobleman, a member of the House of Lords, who, if he is proceeded against in any way, is always entitled to have counsel if the charge is sedition or treason.

The CHAIRMAN: It seems to me that this subsection is ambiguous in two ways. In the first place, does it apply to trials in court or not? In the second place, does it preserve existing rights or confer new rights?

Mr. FULTON: All I see it does is put a prohibition on parliament from taking away existing rights; whether that in itself can be interpreted as creating a new right I do not know, but it seems to me to be a far-fetched interpretation. It preserves existing rights.

The CHAIRMAN: If it only preserves existing rights the question arises what are they? Nobody seems to know. It is generally agreed that if an accused were denied counsel at a criminal trial the higher courts might order a new trial. So in the courts he has a right there.

Mr. DIEFENBAKER: I do not think it goes that far. In the Vesscio case, Vesscio wanted a certain lawyer and the judge would not give him that lawyer and another lawyer was retained, and Vesscio was convicted. The Court of Appeal in Manitoba held, as I remember the judgment, that a person has not an inherent right to the counsel of his choice, and the matter is now going to the Supreme Court of Canada on a dissenting judgment.

The CHAIRMAN: It is one thing to have the right to be represented by counsel and another thing to have counsel of your choice. For instance, in the inquiries which the R.C.M.P. conduct with respect to members of their own force they are not entitled, as the practice is and probably as the law is—they are not entitled to be represented by counsel of their own choice, but they are entitled to be represented by counsel.

Mr. DIEFENBAKER: That is provided for by regulation.

The CHAIRMAN: They can select anyone they wish in the force, but they cannot bring in outsiders.

The WITNESS: The next question—unless there is something more you wish to say in reference to that—

Mr. DIEFENBAKER: There is one question I wish to ask on that section. In your research have you found that habeas corpus has ever been suspended in Great Britain by order in council or outside of parliament?

The WITNESS: Only by statute, as far as I know.

The CHAIRMAN: Has it ever been suspended in Canada at all?

The WITNESS: Not that I know of.

Mr. DIEFENBAKER: In Canada?

The CHAIRMAN: Yes.

Mr. DIEFENBAKER: It was suspended under the order in council to investigate the espionage matter when provision was made that every person held shall be deemed to be lawfully held.

The WITNESS: A habeas corpus application was provided.

The CHAIRMAN: There was no suspension of habeas corpus.

Hon. Mr. GOUIN: I wonder if some of our own statutes in Quebec are not suspended.

The CHAIRMAN: I have never heard of the suspension of habeas corpus in any province in Canada or in Canada. The instance to which my friend refers was not suspension of habeas corpus. If any person held under that order could show that he was held illegally, that he was being deprived of his liberty illegally he was entitled to habeas corpus.

Mr. DIEFENBAKER: With due respect, the order in council was that every person held under this order shall be deemed to be lawfully held, which is in effect an abrogation for it denies the court the opportunity to have shown to it that the applicant was unlawfully held.

The CHAIRMAN: He was not unlawfully held once the order was passed, but habeas corpus applies under different sets of circumstances.

Mr. DIEFENBAKER: Habeas corpus applies to circumstances where persons are held illegally, where there is no law under which they can be held. That is not a limitation. The only question at issue in habeas corpus is an inquiry by a judge as to whether or not there is any lawful reason to hold this man in custody.

The CHAIRMAN: Right.

Mr. DIEFENBAKER: There would be no lawful reason to hold a person incommunicado and deny counsel, or for the other reasons, unless the order in council has specifically said that regardless of the nature of the holding, the holding shall be deemed to be lawful.

The CHAIRMAN: I know, but the "unless" is important. If the order in council was validly passed in legislation by parliament then he was lawfully held. He had every right in the world to go and show he was unlawfully held, but he could not do it once the order was passed, and the order was passed pursuant to an Act of parliament.

Mr. DIEFENBAKER: That is the point I make. I asked the question if ever in Britain habeas corpus was suspended.

The CHAIRMAN: Let me ask another question. In Great Britain have there not been orders stating that the detention of a person shall be held to be lawful? There must have been.

Mr. DIEFENBAKER: Passed by parliament.

The CHAIRMAN: And orders made under Acts passed by parliament. They could not have carried on a war otherwise or had internment camps unless they had legislation like that, and there must have been legislation and orders coming under that legislation stating that persons detained in these camps were lawfully detained.

Mr. DIEFENBAKER: No. I would like you to read the D.O.R.A. regulations, and they provided incarceration by order of the Home Secretary and other officials shall be made under the following circumstances; and once the incarceration is made under those circumstances then, of course, the question arises as to the right of habeas corpus, and the courts held that the declaration by a minister was a declaration in effect that was not challengeable by the courts. It is quite a different thing.

The CHAIRMAN: Is that the suspension of habeas corpus?

Mr. DIEFENBAKER: No.

The CHAIRMAN: Of course, it was not, and neither was the passing of the order under the War Measures Act, which effected the same thing.

Mr. FULTON: There is this distinction, that under the Defence of the Realm Act itself, it was provided that regulations might be made that under certain circumstances people could be held—

Mr. DIEFENBAKER: That is the provision.

Mr. FULTON: Whereas, if my recollection is correct, our War Measures Act did not give any such power. What happened was simply that under the War Measures Act the Privy Council passed an order simply exercising their general emergency powers. It had never been contemplated, when those emergency powers were given, that they would be used in that way. Whereas under the Defence of the Realm Act it was contemplated they would be used that way, and the conditions under which they might be so used were laid down, and must be strictly complied with.

The CHAIRMAN: The Governor in Council stayed strictly within the powers under the War Measures Act in any order they passed, and when they did that they were acting under the authority of parliament. If the imprisonment could be shown to be illegal the right of habeas corpus is determined upon. That is different from suspension of habeas corpus.

Mr. DIEFENBAKER: We have it used here: every person held under this order shall be deemed to be lawfully held.

The CHAIRMAN: So as to make it lawful.

Mr. FULTON: So as to enable the suspension of habeas corpus.

The CHAIRMAN: Habeas corpus does not come into that at all.

Hon. Mr. GOUIN: Do you know of any case where the right to apply for habeas corpus was formally suspended, and there shall not be any application for habeas corpus?

The WITNESS: Habeas corpus has been suspended in the United Kingdom.

Hon. Mr. GOUIN: In Canada?

The WITNESS: I do not know of any case. Take the record in one of the cases that went to the Supreme Court during the last war—the Japanese case —the Chief Justice said expressly that habeas corpus was not suspended, because that was the argument they made, following along the argument which has just concluded.

Mr. Chairman, I have just a few more observations. Shall I go on with them?

The next question is: what is a lawful association? Looking at paragraph (*a*), it seems to me that would have to be defined or extended in some way, because as it is now it would include a partnership or a company; and surely it would not be intended that the legislature should not be able to abridge the freedom or the rights, rather, of partners or persons associated in a business way. Probably it would be sufficient for their purposes if they said lawful assembly, and stopped there.

Hon. Mr. GOUIN: They wanted to cover the word "organization".

The WITNESS: That is one reason, but it is not a good enough reason to bring in two expressions, association and organization; they have no technical meaning at all, and certainly include all sorts of people who are associated together who must be subject to be regulated.

Now, in that connection the expression that you usually find is not "lawful assembly" but "peaceful assembly", and they departed from that because you could not talk about peaceable association or a peaceable organization. So the drafting of that would certainly have to be vetted greatly.

Then, look at paragraph (*c*) which speaks of unreasonable interference with the privacy of the family and so on. I would hardly know myself what the meaning of "unreasonable" is. When we think of the development we have gone through in connection with compulsory vaccination, compulsory sanitation, compulsory education, these are all matters that someone in the past certainly would have thought of as being unreasonable interferences with the family, in the home and privacy.

Hon. Mr. ROEBUCK: It seems to me that "or" should be changed to "and". "Interference with his and her privacy".

The WITNESS: What is unreasonable would be for the courts to decide in determining whether or not a particular Act went too far in the way of interfering with privacy or not.

In that connection you will find this also, that you might have varying opinions from province to province. What one province might consider an act which was an unreasonable interference with the family right another province might take a different view on. One court in one province might take one view and another court in another province might take a different view. There would be a great chance for a difference of opinion. Suppose, for example, that a province decided that the problem of juvenile delinquency required

inspection of all homes, a periodic inspection of everybody's home, to determine what kind of training was being given to the children.

Hon. Mr. ROEBUCK: The same thing could happen with respect to health.

The WITNESS: Yes. That sort of thing would be resisted in some parts of the country, and in other parts of the country they might think it was reasonable interference.

Mr. FULTON: You say the courts would have to legislate in interpreting the word "reasonable". Do I take it that you think that would be a weakness?

The WITNESS: Let us take this particular case. A legislature in western Canada passes a statute which deals with education, sanitation or health, and there is this provision about interference—

Mr. FULTON: My question is, do you think it is unreasonable that a court should be called upon to act in that way, because I was going to ask you, is not that the way we call upon them to act when they are asked to decide if a provincial statute is constitutional or unconstitutional?

The WITNESS: They are not expressing any opinion. As soon as a court says, "I consider the statute to be unreasonable", he is saying, "I think it is an undesirable statute."

Mr. CROLL: He may do that in interpreting it.

The WITNESS: No, he may not; there is nothing in the British North America Act that talks about unreasonableness.

Mr. FULTON: All he is doing is trying to give a judicial interpretation of the word "unreasonable" as used in the text of this proposed section 148.

The WITNESS: He is applying his mind to this matter of reasonableness which is the function of the legislature and not the court.

Mr. FULTON: In interpreting reasonableness in the first case he would have to be guided by his own interpretation to some extent as is always the case—but when the first decision is made, subsequent courts will be guided by the precedent established.

The WITNESS: He cannot say it is good or bad because he does not like it. There comes a ground in between his mere wishes and what the legislature thinks is reasonable. His opinion is very much the determining factor.

Mr. FULTON: I cannot help thinking that he is doing the same thing as when he is deciding whether a statute is reasonable or not.

The WITNESS: There he is not thinking about his opinion as to what is a reasonable thing to do; he is simply taking the language of section 91: is this a regulation of trade and commerce; is this criminal law? Those things do not mean anything personal at all.

Mr. FULTON: Or he would be deciding: is this a matter of property and civil rights?

The WITNESS: There again he may have some predilection for something, but it would not relate to what he thought was desirable. That is what I mean. He is saying this is a desirable or undesirable thing, and that is a legislative act and not a judicial act.

Hon. Mr. ROEBUCK: Two kinds of interference are set up in this clause; the interference with privacy is not prohibited. There is reasonable interference and unreasonable interference. If he were asked to decide whether it was interference then there would be no question of judgment on his part of predilection or prejudice or a thousand other things that might enter into his mind. He says that is interference and it is prohibited, but all interferences are not prohibited.

The WITNESS: That is right, sir. Now, it is getting near to 6 o'clock and perhaps I should go on.

Mr. HANSELL: Are we not confusing in respect to this section (*c*) "unreasonable interference"—are we not confusing the administration of the law by a judge or a court and the making of a law by a legislative assembly or parliament? It seems to me that in our discussion we are confusing the two things What we are trying to decide here is the proprietary or constitutional right of parliament to pass a bill of rights such as this.

The WITNESS: No, this is a measure that will be passed in the United Kingdom parliament.

Mr. CROLL: At our request. It is a mere game of make-believe. They do not pass it without our approval.

The WITNESS: I thought Mr. Hansell was talking about the constitutional power of parliament to enact this legislation.

Hon. Mr. ROEBUCK: We are talking now about the advisability of this Act.

The WITNESS: Yes; and I am pointing out that to determine what is unreasonable there is really in my view a quasi legislative act.

Now, the next point I had in mind covers the words "or other means of communication...." in paragraph (*a*). "Abridging freedom of speech and expression, or of the press or other means of communication. . ." That would include radio, telegraph, postal services, and it seems to me one should not apply the same tests to these matters. Reading it here, as you find it here, you would have to apply the same tests, I think, in the case of a person addressing a public meeting or writing an editorial in a newspaper; you would have to apply the same test to sending a telegram or a postal letter or speaking over the radio, and yet those special types of communication are not ordinarily used for political purposes and, therefore, possibly the same thing should not be applied to them.

Mr. FULTON: You would not include the radio there, would you?

The WITNESS: That may be so, but one would scarcely say that radio should be thrown wide open. You would not say that parliament should not be denied the right to regulate radio, but you would not apply the same tests as to the publication of a newspaper.

Hon. Mr. ROEBUCK: Or to private speech.

The WITNESS: Yes, because of the special character of those means of communication.

Next I look at the paragraph about excessive bail. It seems to me the draftsman probably was thinking that he was restricting a judge from requiring excessive bail.

Mr. CROLL: There is the case of the seamen in Cornwall or Thorold. I do not know what they were charged with. It was not serious, but the judge asked about $2,500 bail for each one.

The WITNESS: Yes, it was excessive. What I am questioning here is the drafting of this clause, because it says that the legislature shall not require excessive bail; it is not the legislature that requires bail, it is the judge.

Mr. CROLL: It leaves it wide open.

The WITNESS: This would not deal with the case of a judge at all.

Hon. Mr. ROEBUCK: This phrase comes from the British bill of rights.

The WITNESS: It is in the American bill too, but it does not appear as a restriction on the legislature.

Hon. Mr. GOUIN: It would not remedy the situation. We know in our province of cases of excessive bail, but this amendment would not solve the problem.

Hon. Mr. ROEBUCK: It is more than draftsmanship; it leaves to the judge the same right as now of determining what is excessive. No judge ever thinks he is imposing excessive bail.

The WITNESS: There is one point more, and I would like to speak for a moment about the character of our constitution as compared with the United States constitution in this connection. In our constitution our concept is that sovereignty resides in parliament. Parliament is a sovereign parliament. That is not so in the United States. In the United States the legal sovereignty is with the people.

Now, as soon as you pass an amendment like this you are taking from parliament a part of its sovereign powers. In the United States that part which is subtracted by their bill of rights remains with the people. It remains within the United States; but once you subtract this sovereign power from parliament by means of an amendment to our constitution what you are really doing is handing back to the United Kingdom parliament a part of our sovereign power, because you are saying: "Please take back from parliament and the legislatures that power to do these things." That is what the effect of this would be.

Mr. FULTON: With respect, that is not giving recognition to the fact that our whole concept has gone beyond what is the strict legal constitutional position. No one would be contemplating, in enacting this amendment to our constitution, handing back some right to the United Kingdom, because we know that the United Kingdom would itself never legislate for Canada with respect to these matters; so, to deprive our own parliament of the right to legislate would not in practice or in fact give any power to the United Kingdom.

The WITNESS: That would be the legal position, whether it is the true political position or not.

Now, I would suggest in that connection that if we had the power to make that amendment ourselves it would not be open to that objection, but as long as we have not got that power it seems to me we are in effect returning to the United Kingdom parliament a part of our sovereign power.

Mr. FULTON: Would you not narrow your words and say "in strict law" but hardly "in effect"?

The WITNESS: Let us say to do these things is clearly part of the powers of a fully sovereign parliament. If you ask the United Kingdom parliament to deprive the parliament of Canada of the power to do this, it must be admitted that the power no longer resides in this country to do these things. Where does it reside? It resides in the United Kingdom parliament. There can be no doubt about it.

Hon. Mr. GOUIN: Whether it would be exercised or not, we deprive our national sovereignty of so much; we take it away from the dominion parliament and from the legislatures.

By Mr. Hansell:

Q. Would it be correct to say that on that basis, and with regard to section (a) concerning the right to organize, that therefore parliament here would not have the authority to pass such a bill as the LaCroix bill, let us say? If this were written into our constitution it prevents us from abridging these things, one of which is the right of organization, the right of association and assembly. Would that take away the right of parliament to pass such a bill as the LaCroix Bill?—A. Well, I do not think I should be asked to pass on the LaCroix Bill because I have not examined it.

Mr. CROLL: The principle involved is to outlaw something or somebdoy.

By Mr. Hansell:

Q. I only used that as an illustration.—A. I see what you mean. I have not examined the bill so I did not know just what it meant, but if that bill purports to destroy an organization then it would be prohibited by this.

Hon. Mr. GOUIN: Quite right; that is a clear answer.

By Mr. Fulton:

Q. In connection with your most startling statement about giving back sovereignty and power over us to the United Kingdom parliament would you not have to consider this in that connection? I am asking for advice because I do not know the technicalities, but would you not have to consider something in connection with the statute of Westminster which declares that the dominions are fully sovereign nations.—A. Yes, but—

Q. As long as that is in force and recognized how could we be said to hand back sovereignty?—A. You have got to look somewhere else to find what it does mean, and when you speak of legislative sovereignty over and over again the Privy Council has held that the whole field of legislative power is vested in parliament or the legislatures in this country, that there is nothing left over. I am suggesting that under our peculiar system that the moment you have the United Kingdom parliament pass this amendment you are subtracting something from our total legislative powers.

Q. I grant you that, but not surely handing it back to the United Kingdom as long as the statute of Westminster— —A. Well, that power must continue to exist somewhere, and it is no longer here.

Q. What we have said in effect is that no body and no parliament or legislature shall have the power to do this.—A. We say the parliament of Canada shall not have the power. We might ask them to say no parliament has the power. You might ask the United Kingdom parliament to limits its powers as well.

The CHAIRMAN: I do not think they would do that.

The WITNESS: There is one other provision I should like to refer to for the record. Looking at section 149 for the moment there are two points I should like to mention there. The first part of it says:

> The rights provided in section 148 shall be enjoyed without distinction on account of race, sex, religion or language.

In the first place section 148 really does not provide rights. It restricts parliament and legislatures from interfering with rights. That is just a question of drafting, of course. The second point to my mind is more important, and that is it presupposes that the draftsmen thought that it was necessary. I would not think it was necessary. I would think section 148 did everything that 149 suggests should be added to it, but it does suggest that without 149 parliament, for example, could pass legislation relating to a racial group which would not be an infringement of section 148. I do not understand why 149 is there at all. That is all I have to say.

By Hon. Mr. Roebuck:

Q. Summing it all up if this bill were passed would we achieve greater civil rights and fundamental freedoms in Canada or would we restrict?—A. Are you asking me to balance the two things?

Q. What would be the general effect of such a measure? Would it be to restrict civil rights and fundamental freedoms in Canada or to broaden them? —A. I do not know that I understand that question. Are you speaking about the factual situation? If this were passed would we have more rights than we have now got?

Q. Yes, or less?—A. I would say no.

Q. You would say we have less.—A. I say we would have not more for the present.

By Mr. Fulton:

Q. Would you not also say we have less chance of having some of the rights we now enjoy being taken away from us?—A. I do not personally feel apprehensive about rights being taken away.

Q. You had to give a strict interpretation of Mr. Roebuck's question. Give a strict interpretation to mine.—A. If this were passed then there is no doubt at all there are certain things that legislatures would be prevented from doing, certain things which might restrict the operations of individuals and others.

Q. So that we have not been given any more rights but it has been made a little more difficult to take rights away from us. Is that a fair statement?—A. I think so.

Hon. Mr. ROEBUCK: From individuals, but clearly we would have restricted the rights of legislatures.

Mr. FULTON: Yes.

Mr. CROLL: That is the general intention.

The CHAIRMAN: Before we break up I want to say something very important. Mr. Howe, the representative of Jehovah's Witnesses, has sent to the clerk of the committee on Human Rights, the case for a Canadian bill of rights. He does not expect it to be read, I gather, but he certainly expects it to be distributed to members of the committee and to become a part of the files or records of the committee.

Mr. CROLL: In order to have a complete record for future committees to deal with had you not better put it on the record so that if we look at it in years to come, or next year when you might not be here, then we can see just what every man had to say.

The CHAIRMAN: If it is circulated I do not think it needs to be printed. We have not even printed those that we have read so far. We read them and circulated them to the committee. It can be kept. It will be available. We will adjourn until Monday afternoon unless you are notified to the contrary in the meantime.

The committee adjourned.